Filed 1/8/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARY HICKS, as Administratrix, etc.,	
Plaintiff and Appellant,	G027282
v.	(Super. Ct. No. 790996)
DONNA L. HUFF,	O P I N I O N
Defendant and Respondent.	

Appeal from a pretrial order and a judgment of the Superior Court of Orange County, John H. Smith, Jr. (retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and David C. Velasquez, Judges. Reversed in part and affirmed in part.

Law Offices of Steven R. Young and Steven R. Young for Plaintiff and Appellant.

Good, Wildman, Hegness & Walley, Gary A. Dapelo and Marsha A. Gable, for Defendant and Respondent.

Mary Hicks, as administratrix of the estate of Richard Morales, sued Donna L. Huff for conversion. Hicks appeals from a pretrial sanction order and from a jury verdict for Huff. She argues the sanctions were imposed without notice or an opportunity to be heard, and the two errors require reversal of the verdict. We agree the sanction order must be reversed, but affirm the verdict.

* * *

Huff was Morales' long-time live-in companion. The day after Morales died, Hicks (his sister) entered his house and videotaped its contents. Upon appointment as administratrix of the estate, Hicks evicted Huff. She then commenced the instant action to recover $37,093.72, claiming that Huff took numerous items belonging to the estate. The list runs the gamut from the substantial (several pieces of jewelry valued at $1,500 to $2,000 each) to the mundane (a $2.68 smoke alarm battery and 12 light bulbs worth $6.43.)

The case was set for trial on Tuesday, June 1, 1999. That morning, Hicks' counsel moved to withdraw and to continue the trial for 90 days. The withdrawal motion alleged that Hicks did not follow the attorney's advice, would not cooperate or communicate with him, failed to pay agreed fees, and requested the lawyer cease work while refusing to execute a substitution of attorneys. The trial judge (Judge Smith) heard the motions in chambers.

In response, Huff orally moved for sanctions. The grounds were unclear. At one point, Huff said Hicks refused to participate in an issues conference or exchange of exhibits required by local court rules. (Super. Ct. Orange County, Local Rules, rule 450.) Later, counsel said he was served the previous Friday night with Hicks' untimely motion to compel discovery, which forced him to work all weekend. The story changed again when Huff's lawyer said the weekend work was to prepare the case for the Tuesday trial.

The trial judge granted the motion to withdraw, continued the trial, and imposed sanctions of $2,500 on Hicks but not her lawyer. When the lawyer asked if he could say something about sanctions, the judge responded "[y]ou are finished. You are out

of here." Referring to Hicks, the judge then said "I suppose I ought to go out and take the bench and tell her what's happening." In open court, the judge announced that he had relieved Hicks' counsel and "I have granted sanctions in favor of counsel for the defendant . . . in the amount of $2,500, and we have continued to the matter . . . ." The judge never told Hicks why the sanctions were imposed, never said they were against her alone, and never offered her the opportunity to say anything. A minute order imposing the sanctions said nothing of the authority justifying the penalty. Huff served notice of entry that said the sanctions were imposed pursuant to California Rules of Court, rule 227.

The case was later assigned to another judge (Judge Valesquez) and proceeded to trial. The jury returned a general verdict for the defense.

I

The sanctions must be reversed for lack of notice or the opportunity for a hearing. In this case, there was no reason to dispense with the requirements of written notice, served at least 21 days prior to hearing (Code Civ. Proc., § 1005.5), stating the grounds upon which a motion is made and the papers, if any, upon which it is based. (Code Civ. Proc., § 1010.) Local trial court rules specify no less, providing that sanctions for failure to comply may only be imposed "[u]pon notice and after hearing." (Super. Ct. Orange County, Local Rules, rule 454.) Likewise, here the trial judge should have directed Huff to serve and file a written notice and motion, setting a hearing date that complied with these rules. But the lack of notice was not the only problem.

We simply cannot say Hicks was afforded any hearing on the motion. Since the judge allowed Hicks' attorney to withdraw prior to considering sanctions, she had no effective way to contest the motion – particularly since the judge heard it in chambers, without Hicks present.

Huff argues the sanction order should be upheld because Hicks' counsel "was given the opportunity to be heard," and Hicks did not challenge the sanctions when they were announced by the trial judge. The first point is wrong factually, and the second is of

no legal significance. It is notable – and troubling – that the trial judge *denied* Hicks' outgoing lawyer the chance to oppose sanctions, saying that he had been relieved and "you are out of here." That Hicks *said* nothing *means* nothing. To begin with, the judge never asked for her position. Even if he had, that would not amount to a hearing. Still lacking was timely written notice, not to mention giving Hicks a reasonable amount of time to retain new counsel.

We reverse the sanction order solely on procedural grounds. Nothing we have said is meant to express any opinion on the merits of the motion, should Huff choose to bring it anew on proper written notice.

II

Turning to the conversion claims, Hicks argues the defense verdict must be reversed because Huff admitted taking property of the estate, and because Hicks' opinion testimony of value was excluded. We disagree.

The admission argument leads nowhere. Hicks does not identify the alleged admissions by Huff – she does not paraphrase the testimony, give its substance, or even offer a citation to the trial transcript. This fails to carry the appellant's burden of affirmatively demonstrating error and overcoming the presumption that the judgment of a lower court is correct. (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1369.)

The evidentiary point is no more persuasive. In reaching a verdict for the defense, it is as likely the jury found no liability as no damages. The presumption of correctness requires us to draw all reasonable inferences in favor of upholding a verdict, so we must presume the jury found no liability. Thus, any evidentiary error on damages (an issue we do not reach) was harmless.

The pretrial sanction order is reversed, and the judgment following trial is affirmed. Each side shall bear its own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.